



Determination

Application for authorisation AA1000457
lodged by
Co-Operative Supermarkets Australia Limited
in respect of
collective bargaining with suppliers of goods and services to the
Australian grocery industry

Authorisation number: AA1000457

7 April 2020

Commissioners:

Rickard

Keogh

Court

Ridgeway

Summary

The ACCC has decided to grant conditional authorisation until 29 April 2025 for collective bargaining arrangements involving current and future members of Co-Operative Supermarkets Australia Limited (CSA). The authorisation allows CSA to represent members in collective negotiations with a range of suppliers of goods and services and impose an active member test.

Authorisation is subject to a condition that the active member test shall not mandate any minimum purchase value or volume requirement for members of the scheme without first obtaining written approval from the ACCC to do so.

1. The application for authorisation

- 1.1. On 5 November 2019, Co-Operative Supermarkets Australia Limited (**CSA**) lodged an application for authorisation AA1000457 with the Australian Competition and Consumer Commission (the **ACCC**) under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). CSA is seeking authorisation for a period of five years.
- 1.2. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. On 19 December 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act to enable CSA to commence negotiations with suppliers and allow information sharing between members regarding terms of supply to support these negotiations, but not to enter into contracts or enforce its proposed 'active member test' (discussed at 2.8 and 2.9). On 25 February 2020, CSA sought to vary the terms of the interim authorisation to allow CSA and its members to make and enter into contracts. This is discussed further in section 6, below.

The Conduct

- 1.4. CSA is seeking authorisation to:
 - collectively bargain on behalf of current and future CSA members with suppliers on the terms of supply of goods and services¹ to CSA member businesses, where these goods and service are consumed by CSA member businesses (e.g. electricity) or offered for sale through CSA member businesses (e.g. food and grocery products), and
 - impose and enforce an 'active member test' (see paragraph 2.9).

(the **Conduct**)

- 1.5. CSA proposes to represent members to collectively bargain with suppliers of goods and services of all kinds to supermarkets and grocery stores, including:
 - food and grocery products (which will initially be products acquired from suppliers via 'direct/directs' and 'direct delivery/charge through' channels, rather than through a wholesaler, see paragraph 2.7). These include

¹ The terms of supply negotiated with suppliers may include: price, volumes, promotional conditions, rebates and benefits earned from a supplier, terms of credit, delivery, picking and packing fees, logistic charges, insurance, rights to refund or credit from spoilage, and ullage.

beverages, bakery products, dry and packaged foods, cleaning supplies, dairy products, delicatessen items, flowers, frozen foods, toiletry and health care products, meat and seafood, pet care, fresh fruit and vegetables, and tobacco.

- equipment, such as shopfitting and displays
- refrigeration
- packaging and wrapping
- waste services
- insurance
- payroll software services
- point of sale systems
- electricity
- EFTPOS
- telecommunications
- logistics

1.6. CSA is not seeking authorisation for collective boycott activity. It submits that collective bargaining will be voluntary for all suppliers and that suppliers can opt to deal directly with CSA's members.

Rationale

1.7. CSA submits that the Conduct would allow CSA member businesses to share information among them; and to collectively bargain through CSA with suppliers to acquire goods and services at prices which would allow CSA member businesses to compete effectively with dominant retail competitors; and to arrest the declining market share of the independent retail supermarket sector.

2. Background

The competitive landscape for independent retail supermarkets

- 2.1. Retail grocery businesses in Australia operate in many forms, ranging from national retailers with fully vertically integrated wholesaling and retailing functions (e.g. Woolworths, Coles and Aldi), through to independent retailers supplied by independent wholesalers.
- 2.2. According to an IBISWorld report,² the top grocery supermarkets in Australia³ (namely, Woolworths and Coles) account for approximately 66.5% of the market share by sales revenue; Aldi accounts for 9.3%; while independent retailers supplied by wholesaler, Metcash Trading Limited (**Metcash**) (namely, IGA, Supa IGA, IGA X-press, IGA Fresh, Foodland and Friendly Grocer) account for approximately 6.6%. The remaining 17.5% of market share is attributed to Costco, FoodWorks and other independent retailers.

² IBISWorld Industry Report G4111, *Supermarkets and Grocery Stores in Australia*, September 2019.

³ The report notes that convenience stores, specialist food retailers, and cafes, restaurants and takeaway food services also compete with supermarkets and grocery stores. However, these retailers are excluded from industry definition adopted in the report.

2.3. At the wholesale level, Woolworths, Coles and Aldi have their own wholesaling operations. Metcash operates a major wholesale distribution business, supplying food and grocery products to independent retailers across Australia.⁴ Metcash owns the IGA and Foodland brands; however, the majority of the 1,600 stores operating under these brand names are independently owned. Other wholesalers in the market include Bidfood Australia Limited and PFD Food Services Pty Ltd.

CSA structure and membership

2.4. Members of CSA⁵ comprise the managers of 'Independent Retail Grocery Stores'⁶ located across metropolitan areas and larger rural centres in Victoria, New South Wales, Queensland, Tasmania and the Australian Capital Territory. There are no geographic limitations that prevent members in other States from joining CSA, but CSA does not presently plan to operate elsewhere in Australia.

2.5. There are currently 121 member stores within CSA, including Ritchies supermarket stores,⁷ IGA-branded stores, and other independent supermarkets.⁸ These stores are currently supplied by Metcash and other wholesalers. CSA aims to grow its membership to cover 20%-25% of independent retailer stores in the eastern States and future members are not restricted to any particular banner groups.

2.6. Under the rules of CSA, members are entitled to, amongst other things:

- actively participate in policies and decision making
- contribute to, and democratically control, the capital of their co-operative
- share information with each other and with CSA, including information about suppliers and terms of supply agreements (subject to any confidentiality obligations).
- cast votes at CSA meetings, with voting entitlements being in proportion to the number of stores controlled by the member business (but limited to 20% of the total available votes).⁹

Retail grocery supply chain

2.7. CSA submits that the food and grocery products sourced by independent retailers broadly fall into the following categories:

- (a) 'Direct/direct' purchases – i.e. product lines developed by a retailer with a supplier, and are delivered directly to the retailer's store and paid for outside the primary wholesaler's system.¹⁰

⁴ Metcash also operates wholesale distribution of liquor and hardware products; and provides merchandising, operational and market support to independent retailers.

⁵ CSA is incorporated as a "distributing co-operative" under Victoria legislation, which adopts the *Co-Operatives (Adoption of National Law) Act 2012 (NSW)* and the Co-Operative National Law.

⁶ CSA defines an Independent Retail Grocery Store as a retail grocery store, which is not majority owned/controlled by a wholesaler, and is not owned/controlled by a major national or international retailer. See CSA's rules, clause 2.1(g).

⁷ Ritchies stores trade under the 'Ritchies Supa IGA' name, and are located in New South Wales, Victoria and Queensland. Metcash owns 26% stake in the Ritches Group.

⁸ CSA estimates that the current member stores account for approximately 10% of the IGA Network by number of stores, and 15% of Metcash's IGA sales volumes in Victoria, New South Wales and Queensland.

⁹ Disclosure Statement, page X.

¹⁰ CSA states that the award winning IGA stores in recent years have sourced not less than 40% of their offering through 'direct to store' goods.

- (b) 'Direct delivery, charge through' purchases – i.e. product lines typically developed by a retailer with a supplier, and are delivered directly to the retailer's store. However, these products are invoiced through the retailer's wholesaler system and the wholesaler takes a margin on the products.
- (c) Warehouse-sourced purchases – i.e. products ordered through and delivered by the primary wholesaler.¹¹

CSA operation and active member test

- 2.8. CSA proposes to negotiate with suppliers on supply terms in respect of 'direct/directs' and 'direct delivery/charge through' (i.e. **direct to store**) consumer products, and other goods and services (e.g. electricity). If successful, the deals would be made available as a standing offer through the CSA system to all members.¹²
- 2.9. CSA also seeks authorisation to impose an 'active member test' which requires CSA's member businesses to acquire goods or services through the CSA system to a minimum value or volume (to be determined) once in each rolling two-month period.¹³ CSA submits that the rationale for the active member test (as mentioned in paragraph 1.4) is to ensure that businesses that join CSA are doing so for the purpose of genuinely participating in collective bargaining arrangements, rather than for the purpose of accessing confidential supply terms (and using the information outside CSA).
- 2.10. Since lodging the application for authorisation, CSA has undertaken not to impose any minimum value or volume requirements on members as part of the active member test without the prior approval of the ACCC.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including retail competitors, wholesalers, suppliers, relevant industry associations and government organisations.
- 3.3. The ACCC received one submission in relation to the application.
- 3.4. The Australian Small Business and Family Ombudsman (**the Ombudsman**) provided a submission supporting the application for authorisation. The Ombudsman noted that there is significant concentration in the supermarket industry; and that competition from new entrants will ensure the major retailers continue to drop their prices, making it increasingly difficult for small supermarkets to compete. The Ombudsman considers that granting authorisation would allow small supermarkets to remain competitive and viable, and contribute to supply chain diversification through opening new markets for small to medium suppliers and promote their sustainability and growth, particularly in rural areas. The Ombudsman also considers that CSA should become a signatory to the *Food and Grocery Code of Conduct* (the **Code**) to further enhance protections for small businesses with whom it engages.

¹¹ For a typical independent retailer, these are the core consumer products and the majority of stock by value.

¹² However, many deals may be 'regionally based', given possible logistics and supply-side limitations.

¹³ CSA states that members would not be required to purchase prescribed items or a specified basket or range of goods.

- 3.5. On 13 March 2020 the ACCC issued a draft determination proposing to grant authorisation for five years. A pre-decision conference was not requested following the draft determination.
- 3.6. On 18 March 2020 CSA provided an undertaking not to require its members to meet any minimum value or volume requirements as part of the active member test without first providing written notice to the ACCC and securing its approval. No other submissions were provided to the ACCC in response to the draft determination.
- 3.7. Public submissions by CSA and interested parties are available on the Public Register for this matter.¹⁴

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. CSA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of competition

- 4.3. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. CSA notes that its member businesses operate in the retail supermarket industry but the Conduct relates to the supply chain to the retailers in the industry. The collective bargaining group is intended to compete with wholesalers who supply retail supermarkets. However, the Conduct could be applied to goods and services of all kinds that are either consumed by CSA's member businesses, or offered for sale through CSA's member businesses.
- 4.5. The ACCC considers that the following areas of competition are relevant to its assessment of the Conduct:
 - the wholesale acquisition of goods and services by supermarkets,
 - the retail supply of food and grocery products by supermarkets, and
 - the wholesale supply of food and grocery products by suppliers

in the eastern states of Australia.

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.

¹⁴ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/co-operative-supermarkets-australia-limited>

Future with the Conduct

4.7. In the future with the Conduct, the ACCC considers CSA's members will have an additional option for obtaining goods and services for their stores; sourcing 'direct/direct' and 'direct delivery, charge through' purchases through CSA if they choose. CSA would provide an ordering platform through which its members could order directly from the suppliers on terms agreed with CSA. CSA members would continue with their current supply arrangements to obtain warehouse-sourced purchases.

Future without the Conduct

4.8. The ACCC considers that, without the Conduct, the status quo is likely to continue. CSA's member businesses would continue to individually negotiate with suppliers for the supply of 'direct to store' products and other goods and services, and continue to purchase their core range of 'warehouse-supplied' products through wholesalers.

4.9. CSA submits that the independent retail supermarkets, acting individually, have limited purchasing power to leverage in negotiating supply prices compared to the major integrated retailers. CSA considers that the independent retail supermarket sector is in decline and is at serious risk of failure without the Conduct. In support of this proposition CSA points to research suggesting that the market share of Metcash-supplied independent retail supermarket stores has been lost to Woolworths, Coles and Aldi over the last decade¹⁵ and the sector faces rising costs coupled with stagnant (or falling) sales revenues that will continue into the future.¹⁶ CSA also notes the declining revenue of Metcash and submits that this has significant consequences for the independent retailers.¹⁷

4.10. The ACCC notes CSA's submissions on this issue but considers that these submissions do not currently provide sufficient evidence for the ACCC to assess the future without the Conduct as one in which independent retail stores are no longer viable.

Public benefits

4.11. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁸

4.12. CSA submit that the Conduct is likely to result in public benefits including:

- Improved negotiating power for retailers resulting in more favourable terms of supply for goods and services from suppliers, reducing the cost base for these retailers;

¹⁵ Application for Authorisation, Annexure A page 3

¹⁶ Application for Authorisation, Annexure A pages 1-4.

¹⁷ Application for Authorisation, Annexure A page 10.

¹⁸ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- Improved viability of independent retail supermarket stores and enhanced capacity to compete with major retailers, supporting the viability of the wholesaler(s), and preserving diversity of retail offering and consumer choice (i.e. more stores offering different products for sale)¹⁹;
- Additional pathways for suppliers to supply their goods and services to a large range of retailers, leading to greater diversity of retail product lines (between independent retailers, and between independent retailers and major retailers);²⁰
- Efficiencies from:
 - centralised ordering (emulating large volume order to reduce risk to suppliers and inconsistency in order volumes)
 - having a centralised point for the supplier to address compliance with promotional arrangements, reducing risk to the supplier of uncertainty in product placement
 - reducing time and resources devoted to negotiation on price and other terms and conditions
 - having control of and transparency of price fluctuations, with the ability to directly alert CSA's members to changes in price and conditions
 - sharing skills and experience
 - utilising a central invoicing system to reduce operating costs for retailers and suppliers.

4.13. The Ombudsman agreed there would be public benefits, including from small supermarkets being better able to compete with major retail supermarkets, preservation of consumer choice in retail offering and enabling small to medium supplies to grow their businesses (see paragraph 3.4).

4.14. The ACCC considers the following public benefits are likely to result from the Conduct.

Reduced transaction costs

4.15. The ACCC accepts that collective bargaining through CSA is likely to result in public benefits from transaction cost savings relative to the situation where individual negotiations take place between each of CSA's members and each supplier of the relevant goods and services. CSA's member businesses can share the costs of negotiation with many suppliers through CSA. Similarly, the costs to suppliers will be reduced by negotiating supply terms and promotional arrangements with a single representative body. The ACCC accepts that a single negotiation process covering a large number of supply arrangements, resulting in bulk purchases of goods or services through CSA's centralised ordering system, is likely to deliver considerable transaction cost savings for both CSA's member businesses and suppliers.

4.16. The co-ordination on distribution of goods by multiple suppliers through CSA²¹ is likely to prevent duplication of deliveries, increase efficiency in delivery arrangements and

¹⁹ Application for Authorisation, Annexure A pages 10 and 11.

²⁰ Application for Authorisation, Annexure A page 11.

²¹ That is, aligning delivery/aggregating distribution of bulk orders to CSA's member businesses on a run-to-run basis by designing routes to take account of which suppliers are sending products and which CSA members will be receiving them, enables more efficient delivery routes.

materially lower distribution charges. The reduction in distribution charges would likely flow to both retailers and suppliers.

Better input into contracts

4.17. The Conduct provides for CSA's members to discuss their desired outcomes from collective negotiations and to identify common issues they wish to be addressed through contractual arrangements with suppliers. This is likely to result in more complete and efficient contracts that better reflect the needs of individual members of the bargaining group.

Increased retail competition between supermarkets

4.18. With the Conduct, it is likely that CSAs members will achieve transaction and logistic costs savings. These businesses will also be more likely to have more bargaining power with their aggregated, higher purchasing volumes, and may therefore be able to negotiate more favourable terms and conditions of supply with the suppliers, i.e. lower prices or better non-price terms (e.g. quality and service). If so, this is likely to allow the independent supermarkets to improve their offerings to consumers (including through lower retail prices), and enable them to compete with their retail competitors more effectively.

4.19. Due to the ease of accessing 'direct to store' suppliers, the Conduct is likely to lead to independent supermarkets within CSA increasing their purchase of existing lines of products or sourcing new products within the 'direct to store' categories. In turn, this is likely to allow the independent supermarkets to provide a more diverse and differentiated product and service offerings to consumers, and better compete with major retailers.

Increased competition between food and grocery suppliers

4.20. With respect to food and grocery product suppliers, the Conduct is likely to provide them with an increased access to a wider range of independent supermarkets.²² The aggregated demand from the CSA group is likely to lead to larger and more consistent order volumes, and greater demand certainty for suppliers. This may attract the interest of new suppliers, and lead to greater competition between existing suppliers and new suppliers to supply CSA. Moreover, as mentioned in ASMFEO's submission, it is likely that small to medium suppliers (particularly in regional Australia) may decide to increase production in order to supply CSA. To the extent this occurs, this may also promote competition in the supply of food and grocery products to third parties (e.g. supermarkets outside the CSA group).

Increased competition in the wholesale acquisition of food and grocery products

4.21. The Conduct effectively allows CSA to act as a new wholesale level competitor. With CSA proposing to establish a centralised wholesale ordering system (albeit initially only limited to 'direct to store' products), suppliers would have a new outlet through which they could supply products at the wholesale level. That is, suppliers in the 'direct/directs' category (discussed in paragraph 2.7(a)) would now have the choice to sell through CSA (in addition to the limited pool of existing wholesalers), in addition to

²² This is because CSA's members would be sharing information with each other, and with CSA, about suppliers of 'direct to store' products.

selling to their existing customers (i.e. selling directly to retailers²³ and other customers). Suppliers currently in the 'direct delivery/charge through' category (discussed in paragraph 2.7(b)) would now have the choice of selling products through CSA, or through the existing wholesaler's system interface.²⁴ For any new suppliers coming onto the market, they would also be able to access customers through CSA's new system for product ordering and distribution, as well as through more traditional means. The opening up of this new supply channel through the proposed entry of CSA is likely to introduce new competitive pressure on existing acquirers of goods and grocery products, and increase competition in the wholesale acquisition for these products.²⁵

Public detriments

4.22. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*²⁶

4.23. CSA considers that its member businesses compete with each other in their retail offering to consumers, and in the acquisition of products from suppliers (particularly in the 'direct to store' segment). However, it submits that the public detriments resulting from the Conduct would be minimal (if any) due to the following factors:

- participation in collective bargaining, or becoming a member of CSA, is voluntary for all parties and no collective boycott is proposed;
- increased access for suppliers to customers
- appropriate governance measures and information sharing protocols of CSA
- the longer term reversal of declining sales to consumers, protecting both the independent retailers and the independent wholesale sector.

4.24. CSA submits that the reduction in competition between CSA's member businesses for supply terms will not have a material adverse impact on competition because the authorisation brings back into balance what the ACCC has recognised as a concentrated industry.²⁷

4.25. CSA also submits that while competition between retailers for supply terms will be reduced, that is not harming any aspect of the market that is genuinely 'pro-consumer'.²⁸

²³ This include retailers who are not CSA's member businesses; as well as retailers who are CSA's members businesses, but have decided not to acquire specific food and grocery products through CSA, and are instead continuing to acquire these products directly from suppliers.

²⁴ The existing wholesaler (Metcash) is an intermediary in respect of the 'direct delivery/charge through' products. It provides the linkage between the independent retailers and the suppliers. The products are ordered and invoiced through the wholesaler's systems, however, the wholesaler does not stock the products in its warehouse or deliver it to the retailer. The products are delivered directly to the retailers' stores.

²⁵ Competition for the wholesale acquisition for good and grocery products may be further enhanced in the future, if CSA decided to expand the scope of the Conduct to include 'warehouse-sourced products' (mentioned in paragraph 2.7(c)). However, CSA indicates that it has no intention to do so.

²⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

²⁷ Application for Authorisation, Annexure A page 8.

²⁸ Application for Authorisation, Annexure A page 8.

4.26. The ACCC considers that the public detriment resulting from the Conduct is likely to be limited.

Competition between CSA's member businesses for wholesale acquisition of goods and services

4.27. CSA's member businesses may be considered to be each other's competitors for the wholesale acquisition of goods and services. To the extent that CSA's member businesses participate in the Conduct, they are agreeing to no longer compete. The Conduct therefore will lessen competition in the acquisition of goods and services.

4.28. However, the ACCC considers the effect of any such reduction in competition is likely to be limited.

4.29. The bargaining group comprises a small proportion of the total wholesale purchasers in respect of food and grocery products, and business-related goods and services commonly required for retail store operation (e.g. shop equipment, point of sale systems, electricity and other utilities). If authorisation is granted, there will continue to be competition from a broad range of participants outside the bargaining group. It is expected that wholesalers, major supermarkets, independent supermarkets not within the bargaining group, speciality retailers, convenience stores and food establishment will compete with the CSA to acquire food and grocery products; and these, and many other retail businesses (not limited to the retail grocery sector) will compete with CSA to acquire business-related goods and services from suppliers.

Competition in the retail supply of food and grocery products

4.30. Deals organised by CSA in respect of 'direct to store' products would be made available as a standing offer to all members. To the extent that members decide to take up those offers, this may lead to homogeneity in the supply of products at the retail level and lessen product and service differentiation. However, this is unlikely to be of concern for the following reasons:

- Participation is voluntary for CSA's member businesses. Subject to the active member test, members will remain free to independently decide whether, and what, products to purchase through the group or source directly from suppliers, based on what they consider to be of value to their customers. CSA has indicated that it has no intention to cause any members to purchase prescribed items or a specified basket or range of products. CSA's application indicates that the active member test may include a minimum purchase threshold based on value or volume, designed to ensure members are bona fide and genuinely committed to the business of CSA. CSA has subsequently undertaken not to impose minimum value or volume requirements without the ACCC's prior approval.
- 'Direct to store' products are not the core range of products stocked by independent supermarkets; rather, they are products that characterise the stores' appeal, providing them with a point of difference compared to their major competitors. Enabling independent supermarkets to more easily access 'direct to store' products through CSA would likely lead to an increase in the range of products stocked at these supermarkets, which will provide more consumer choice and may invoke a competitive response from non-member retailers. As between CSA's member businesses, competitive tension will exist irrespective of the Conduct. Retail competition generally occur in local areas, and independent supermarkets are typically geographically dispersed. But,

even if a similar range of 'direct to store' products are purchased by CSA's member businesses, those products will only make up a small proportion of all products stocked by members. Further, given the competitive nature of retail competition, strong incentives should remain for members to compete with each other at the retail level.

Effect of the active member test on CSA Members

- 4.31. In some cases, the active member test could result in members purchasing products through CSA on less favourable terms than if they had purchased the products directly from suppliers. This may occur if overall benefits of membership (e.g. higher overall cost savings and sales/profits derived from other products purchased through CSA) are such that members are prepared to accept a particular deal from CSA that is less profitable for them in order to retain access to other deals that they desire. The ACCC considers these situations would be uncommon, as bulk purchasing generally give rise to better supply terms (e.g. prices) for the purchasers. Further, participation in collective bargaining and in any resulting joint buying arrangements for any specific products are voluntary; and members are free to choose the products they wish to acquire through CSA, and exercise judgement to take up deals that best serve their commercial interests.
- 4.32. Depending on the level at which the minimum purchase threshold is set, it could still interfere with member businesses' decisions regarding what products they purchase through CSA.
- 4.33. On 18 March 2020 CSA undertook not to set any minimum value or volume requirement as part of its active member test without first affording at least 30 days' written notice to the ACCC and either securing the ACCC's approval or seeking to end the Authorisation (if granted). CSA also submits that it is unlikely that CSA would seek to impose such requirements during the period of the authorisation. ACCC approval in these terms is included as a condition to authorisation, as described at paragraph 5.7.
- 4.34. Unless CSA seeks the ACCC's prior approval, the active member test shall take the form of a requirement for members of the collective bargaining scheme to make a purchase, of any product in any quantity, through the scheme at least once in each rolling two-month period.

ACCC conclusion on public detriment

- 4.35. Overall, the ACCC considers that the Conduct is likely to result in limited public detriment.

Balance of public benefit and detriment

- 4.36. The ACCC considers that the collective bargaining by independent supermarket retailers is likely to result in some public benefits through transaction cost savings, more efficient contractual outcomes by improving the input of retailers into their negotiations with suppliers, and improved competition in the retail market. Balanced against this, the ACCC considers that the Conduct is likely to result in limited public detriment, particularly as the arrangements are voluntary and a collective agreement will only be reached where it is in the interests of both sides of the negotiation.
- 4.37. Therefore, for the reasons outlined in this determination, the ACCC considers that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.38. The Act allows the ACCC to grant authorisation for a limited period of time.²⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.39. In this instance, CSA seeks authorisation for five years. CSA considers that the major supermarket retailers are likely to continue to operate very competitively over that period, and the factors that have contributed to the decline of the independent supermarkets will continue, unless sufficient time is given under a grant of authorisation to allow the Conduct to occur.
- 4.40. The ACCC considers that a five year authorisation period would be sufficient to allow potential benefits to be realised, but is not long enough for possible detriments to significantly impact market dynamics. In light of its assessment of the public benefits and detriments likely to result from the Conduct, the ACCC grants authorisation until 29 April 2025.

5. Determination

The application

- 5.1. On 5 November 2019 CSA lodged an application AA1000457 with the ACCC, seeking authorisation under subsection 88(1) of the Act. CSA seeks authorisation for the Conduct as defined in paragraph 1.4.

The authorisation test

- 5.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.3. For the reasons outlined in this determination and subject to the condition below, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.4. Accordingly, the ACCC had decided to grant conditional authorisation.

Conduct which the ACCC has decided to authorise

- 5.5. The ACCC has decided to grant conditional authorisation AA1000457 to enable CSA to and its current and future members³⁰ to collectively bargain with suppliers of goods or services, and impose and enforce an 'active member test, as described in paragraph 1.4 and defined as the Conduct.

²⁹ Subsection 91(1)

³⁰ Section 88(2) of the Act.

- 5.6. The authorised conduct does not extend to any contracts, arrangements or understandings between CSA member businesses in relation to their retail supply of products to consumers.
- 5.7. Authorisation AA1000457 is subject to the following condition:
- a) Members of the collective bargaining group cannot be required to purchase a minimum quantity of goods or goods to a minimum value through the scheme over any period unless:
 - i) CSA first notifies the ACCC in writing of its intention to impose any such requirements and the reasons it considers such requirements to be necessary by emailing adjuication@accc.gov.au; and
 - ii) the ACCC approves in writing the imposition of a minimum volume and/or value requirement.
 - b) For the avoidance of doubt, this condition does not prevent a requirement for members to make a purchase through the proposed collective bargaining scheme in each rolling two-month period where members have discretion to determine what goods to purchase and in what quantity.
- 5.8. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may substantially lessen competition within the meaning of section 45 of the Act.
- 5.9. The ACCC has decided to grant authorisation AA1000457 until 29 April 2025.
- 5.10. This determination is made on **7 April 2020**.

6. Interim authorisation

- 6.1. On 13 March 2020, interim authorisation was granted under subsection 91(2) of the Act. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

7. Date authorisation comes into effect

- 7.1. This determination is made on 7 April 2020. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 29 April 2020.